***United States Court of Appeals***

***for the Second Circuit***


# APPELLEE'S BRIEF

74-2374 12/3/74

To be argued by
WILLIAM P. DeWITT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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PIETRO C. RUBINO, for himself and all other persons similarly situated; and PHILIP J. ZICHELLO,

Plaintiffs-Appellants,

HARRY T. NUSBAUM,

Plaintiffs-Intervenor-Appellant,

-against-

JOHN J. GHEZZI, individually and in his capacity as Acting Secretary of State of the State of New York; et al., Defendant-Appellees.

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74-2374

BRIEF OF DEFENDANT APPELLEES, KATZ, IRIZARRY AND THE NEW YORK CITY BOARD OF ELECTIONS

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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PIETRO C. RUBINO, for himself and all other persons similarly situated; and PHILIP J. ZICHELLO,

Plaintiffs-Appellants,

HARRY T. NUSBAUM,

Plaintiff-Intervenor-Appellant,

-against-

JOHN J. GHEZZI, individually and in his capacity as Acting Secretary of State of the State of New York; HERMAN KATZ, individually and in his capacity as City Clerk of the City of New York; IVAN E. IRIZARRY, individually and in his capacity as Finance Administrator of the City of New York; and ALICE SACHS, ELRICH A. EASTMAN, HERBERT J. FEUER, CHARLES A. AVARELLO, JAMES F. BASS, ELIZABETH A. CASSIDY, ANTHONY SADOWSKI, JOSEPH L. PREVITE, STANLEY C. KOCHMAN, and SALVATORE SCLAFINI, all individually and in their capacities as the members of the Board of Elections of the City of New York,

Defendants-Appellees.

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BRIEF OF DEFENDANT APPELLEES, KATZ IRIZARRY AND THE NEW YORK CITY BOARD OF ELECTIONS

## STATEMENT OF THE CASE

This is an action brought pursuant to 42 USC 1343. Jurisdiction of the subject matter is purportedly based on 28 USC 1331, 1343 and 2201.

Plaintiff, Philip J. Zichello is a duly elected Judge of the Civil Court of the City of New York, whose term of office began on January 1, 1970 and is due to expire on December 31, 1974. Judge Zichello brings this action on his own behalf. Plaintiff Pietro C. Rubino purports to be a registered voter, resident and domiciliary of the district in which Judge Zichello was elected.[1]

Mr. Rubino alleges that he voted for Judge Zichello when Zichello was a candidate for the Judgeship he now holds. Alleging also that he is over seventy years of age, Mr. Rubino brings this action as a class action pursuant to FRCP 23 (a) and (b) on behalf of all persons who:

1) are over 70 years of age and are eligible voters in the State of New York; and

2) all persons who voted for Judge Zichello.

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1. The Election Districts from which Civil Court Judges are chosen were originally contained in Section 5 of the old New York City Municipal Court Code, which was subsequently superseded by the New York City Civil Court Act in 1962. However, by special legislative enactment, the provisions of Section 5 of the Municipal Court Code are still effective. See Chapter 458 of the Laws of 1974; McKinney's 1974 Session Laws of New York, vol. 1, p. 606.

Plaintiff-intervenor Harry T. Nusbaum is a Judge of the Civil Court of the City of New York whose term of office commenced on January 1, 1970 and is due to expire on December 31, 1978. Judge Nusbaum intervenes as a plaintiff on his own behalf.

Pursuant to Article 6 section 15 of the New York constitution which provides in pertinent part as follows in subdivision "(a)":

> "The judges of the court of citywide civil jurisdiction shall be residents of such city and shall be chosen for terms of ten years by the electors of the counties included within the City of New York from districts within such counties established by law."

The term of office for both Judges Zichello and Nusbaum would run for ten years and expire on December 31, 1979. However, by a further provision of the New York constitution, Article 6, section 25, which provides in pertinent part as follows in subdivision (b):

> "b. Each . . . judge of a court for the City of New York established pursuant to section fifteen of this Article . . . shall retire on the last day of December in the year in which he reaches the age of seventy."

The term of office for a judge of the Civil Court ends on the last day of the year in which the judge becomes seventy years old.

Also relevant is Judiciary Law Section 23 which provides, in pertinent part, as follows:

> § 23 Age limitation on terms of judicial office.
>
> No person shall hold the office of judge, justice or surrogate, of any court whether of record or not of record except a justice of the peace of a town or police justice of a village, longer than until and including, the lastday of December next after he shall be seventy years of age. . ."

Judge Zichello was born on November 1, 1904. His seventieth birthday came on November 1, 1974 and his term of office will end on December 31, 1974. Judge Nusbaum was born on August 10, 1908. His seventieth birthday will come on August 10, 1978 and his term of office will end on December 31, 1978.

The defendants are:

1) John J. Ghezzi, the Acting Secretary of State of the State of New York, responsible for declaring vacancies in elective positions in the State of New York and for forwarding the declarations of such vacancies to the appropriate government officials.

2) Ivan E. Irizarry, the Finance Administrator of the City of New York. He is responsible for disbursing salary checks to the Judges of the Civil Court of the City of New York.

3) Herman Katz,[2] the City Clerk of the City of New York, who has the responsibility, among others, of administering the oath of office to newly elected Judges to the Civil Court of the City of New York.

4) The remaining defendants constitute the Board of Elections of the City of New York. It is among their responsibilities, to conduct elections for the position of Judge of the Civil Court of the City of New York and declare the appropriate winner of such elections.

The final relief sought by plaintiffs is a declaratory judgment that Article 6 section 25 of the New York State constitution and Judiciary Law section 23 violate the First and Fourteenth Amendments to the United States Constitution and an injunction, restraining the defendants from taking any action towards the election, confirmation or recognition of a successor to Philip J. Zichello as a Judge of the Civil Court of the City of New York and restraining defendants from ceasing to recognize Philip J. Zichello as a Judge of the Civil Court of the City of New York and from

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2. In November of 1974 Mr. Katz retired as City Clerk. The position is now held by Thomas Lenane, Acting City Clerk.

interfering in any way with the continued exercise by Judge Zichello of the powers and duties of his office.

The case came before the U.S. District Court for the Southern District of New York on an order to show cause which sought the convening a three judge court to hear an application for a preliminary injunction pursuant to 28 USC 2281 and 2284.

On the return date of the order to show cause, the action was dismissed for lack of a substantial federal question. From this dismissal plaintiffs now appeal.

## THE QUESTION PRESENTED

The question presented to the Court on this appeal is whether the people of the State of New York may through their state constitution, limit the term of office of a Judge of the Civil Court of the City of New York based upon the judge's age.

## POINT I

DISMISSAL OF THE COMPLAINT WITHOUT CONVENING A THREE JUDGE COURT WAS PROPER.

It is the duty of the District Court to ascertain, in the first instance, whether an application to convene a three judge court pursuant to 42 USCA 2284, presents a substantial federal question. Telephone System Inc. v. Illinois Bell Telephone Company (D.C. Ill 1962) 210 F Supp 471 aff'd 376 US 782, Hoxsey Caucer Clinic v. Folson (D.C.D.C. 1957) 155 F Supp 376 Bradley v. Waterfront Commission of NY Harbor (D.C.N.Y. 1955) 130 F. Supp 303.

Such a duty is not ministerial but is rather a judicial function and requires a preliminary inquiry into the merits of the complaint. Merced Rosa v. Herrero , (CA. Puerto Rico 1970) 423 F 2d 591, Hager v. St. Paul Board of Education (D.C. Minn. 1971) 333 F Supp 1355.

In determining the substantiality of the federal question, prior decisions of the United States Supreme Court must be considered. Heaney v. Allen (DCNY 1969) 299 F Supp 1300, aff'd 425 F 2d 869; Jehovah's Witnesses in State of Washington v. King County Hospital Unit No. 1 (DC Wash 1967) 278 F Supp 488 aff'd 390 US 598, Reh den 391 US 961, and also decisions of the District Court's appropriate Court of Appeals should be considered.

Alabama NAACP v. Wallace D.C. Ala. (1967) 269 F Supp 346.

Essentially, the federal question posed by the complaint is whether the United States Constitution, specifically the First and Fourteenth Amendments thereto, prohibits New York from limiting the term of Judge Zichello's office, based on his age.

It has been held by the Supreme Court of the United States in McIlvanie v. Commonwealth of Pennsylvania 415 US 986 (March 25, 1974) that age classification in the form of the mandatory retirement of a Pennsylvania state policeman at age sixty presented no substantial federal question.

This Court in June of 1972 had before it the case of Wiess v. Walsh 324 F Supp 75, aff'd in open court 461 F 2d 846, cert den 409 US 1120, which upheld the dismissal of the complaint in the district court where a job offer had been withdrawn from one because he had passed age 65. Quoting J. Tyler in the district court opinion (SDNY, Feb. 1971) at 324 F Supp at p. 77:

> "On its face therefore, the denial of a teaching position to a man approaching seventy years of age is not constitutionally infirm."

Clearly the District Court did not commit error in dismissing the complaint without convening a three judge court. See also Armstrong v. Howell 731 F Supp 48, (Neb. D.C. 1974, upholding mandatory retirement of a civil servant at age 65; and Retail Clerks Union Local 770 v. Retail Clerks Int Assoc 359 F Supp 1285 (DC Cal. 1973, upholding mandatory retirement of union officers and employees at age 65).

State court decisions have also upheld classification based on age. See Gossman v. State Employees Retirement System 177 Neb 326, 129 NW 2d 97 (1964) American Airlines v. State Commission for Human Rights 29 AD 2d 178 286 NYS 2d 493 (1968), Fabio v. City of St. Paul 267 Minn 273, 126 NW 2d 259, (1964).

## POINT II

LIMITING A TERM OF OFFICE BY THE AGE OF THE OFFICE HOLDER IS NOT VIOLATIVE OF FOURTEENTH AMENDMENT EQUAL PROTECTION.

The test of whether or not a law is determined to violate the Equal Protection Clause of the Fourteenth Amendment is stated in Dunn v. Blumstein 405 US 330 at p. 335:

> To decide whether a law violates the Equal Protection Clause we look in essence to three things: the character of the classification in question; the individual interests affected by the classification; and the governmental interests asserted in support of the classification. Cf. Williams v. Rhodes 393 US 23, 30 (1968).

## A. THE STATE'S INTEREST

The interest of the people of the State of New York in limiting the term of judicial office by the age of the office holder was expressed long ago by the New York Court of Appeals in People ex rel Joyce v. Brundage[3.] 78 NY 403 at p. 406 (1879)

> "The disability of age was considered when the question of the extent of the term was under consideration, and in fixing long terms for judicial officers, it was deemed wise, instead of prohibiting the election of those who were too old to serve the full period, to limit the term in such cases to the length of time they could serve.

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3. Construing former Constitution section 13 of article 6 of the 1846 Constitution as amended in 1870 which provided at that time: "But no person shall hold the office of judge or justice of any court longer than and until and including th e last day of December next after he shall be seventy years of age." This provision of the Constitution has been held to create an expiration of the term of office. People ex rel Jackson v. Potter 47 NY 379, 380, 385; People ex rel Davis v. Gardner 45 NY 819, 820.

The restriction on the term of judicial office based on the age of the office holder is a concept which was included in the first constitution of the State of New York, adopted:[4.]

> "In Convention of the Representatives
> of the State of New York
> Kingston, 20th April 1777.
>
> "XXIV . . . the chancellor, the judges of the Supreme Court and first judge of the County Court in every county, hold their offices during good behavior, or, until they shall respectively attain the age of sixty years."

All reference to a mandatory retirement age for judges was deleted from the third constitution adopted in 1846. However, the 1846 constitution was amended in 1870 to include a judiciary article and is known as, "The Judiciary Article of 1869." Section 13 of said amendment provided as follows:

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4. The second constitution of the State of New York adopted in 1821 by constitutional convention contained in Article V, section 3:

> §3 [Chancellor and supreme court justices official term] The chancellor and justices of the supreme court shall hold their offices during good behavior or until they shall attain the age of sixty years.

> §13 [Judges, how chosen, term of office]
> " . . . But no person shall hold the office of justice or judge of any court longer than until and including the last day of December next after he shall be seventy years of age.

The seventy year age limit was continued in the Fourth Constitution of 1894 in Article 6 Section 12. The Fifth Constitution of 1938 retained the provision in Article VI Section 19, and is currently contained in Article VI Section 25 of the Constitution which is under attack in this case.

For a history of the New York Constitutions see Lincolns Constitutional History of New York (5 vol); New York State Constitution Annualated Constitutional Convention Committee of 1938.

## B. THE INDIVIDUAL INTERESTS AFFECTED BY THE CLASSIFICATION.

Most New York State court judges, and all civil court judges are elected for a term of years and are not appointed for life as in the federal system. The right to hold judicial office, and the term thereof are to be found, not in the Constitution of the United States but rather in state law. As was said by the Supreme Court in Board of Regents v. Roth 408 US 564, at p. 577, 92 S Ct 2701, 33 L Ed 2d 548 (1972):

> Property interests are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law, rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Whatever rights Judges Zichello and Nusbaum have in their judicial offices are to be found in state law and more specifically as regards this appeal in the provisions of Article 6, Sections 15 and 25 of the New York constitituion, and Section 23 of the Judiciary Law.

Moreover Judiciary Law section 22 required plaintiff judges to file a certificate stating:

> ". . . the year in which he was born and the time when his official term will expire by completion of a full term or by reason of the disability of age prescribed in section 23 of this chapter." (emphasis supplied)

Under these provisions of the state constitution and judiciary law the term of office, upon the office holder reaching age seventy, expires. The term does not continue, with a vacancy in office. See People ex rel Jackson v. Potter 47 NY 379, People ex rel Davis v. Gardner 45 NY 819 (construing the provisions of the constitution of 1821 supra).[5]

5. None of the provisions of the state constitutions uses the word "expire" in refering to the term of office. Such an interpretation has arisen in the case law.

Upon the expiration of elective judicial office either by expiration of the term of years or upon superannuation of the incumbent, a new election is required to be held and a new term of office is commenced.[6.]

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6. On November 5, 1974 an election was held to fill the judgeship of Judge Zichello which will expire December 31, 1974. The election was won by George C. Sena, who, although not joined in this case, obviously is a neccessary party pursuant to FRCP 19(a).

## C. THE NATURE OF THE CLASSIFICATION INVOLVED

The Constitutional implications of classification based on age were succinctly stated by J. TYLER in his opinion in Weiss v. Walsh 324 F Supp 75, aff'd in open court 461 F 2d 846, cert den 404 US 1120, (SDNY Feb. 1971) at p. 77:

> ". . . the absence of specific reference to age in the Fourteenth Amendment does not alone insulate age classification from constitutional scrutiny any more than does the absence of memtion of poverty or residency for example. . . But being a classification that cuts fully across racial religious and economic lines and one that generally bears some relation to mental or physical capacity, age is less likely to be an invidious distinction."

A number of tests have been devised to determine if a state law violates Fourteenth Amendment Equal Protection.

As the Supreme Court continues in Dunn v. Blumstein, 405 US at p. 335:

> "In considering laws challenged under the Equal Protection Clause, this Court has evolved more than one test depending upon the interest affected or the classification involved."

In footnote 6 of the Dunn opinion, on p. 335, cases are cited which illustrate the different approaches the Court has taken when laws are challenged under the Equal Protection Clause.

In Kramer v. Union Free School District, 395 US 621, wherein the Court considered a law which conditioned the right to vote in school district elections upon ownership of taxable realty, the court said at p. 627:

> Accordingly, when we are reviewing statutes which deny some residents the right to vote, the general presumption of constitutionality afforded state statutes and the traditional approval given state classifications if the Court can conceive of a 'rational basis' for the distinctions made are not applicable.

and again at 633:

> "The issue is whether the . . . requirements do in fact sufficiently further a compelling state interest to justify denying the franchise to appellant and members of his class. (emphasis supplied)

In Skinner v. Oklahoma, 316 US 535, at p. 541 the Court considered a statute providing for the sexual sterilization of habitual criminals:

> "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race." (emphasis supplied)

and further from p. 541:

> ". . . strict scruting of the classification which a state makes in a sterilization law is essential lest unwittingly or otherwise invidious discriminations are made against groups or types of individuals in violation of the constitutional guarantee of just and equal laws." (emphasis supplied)

However, in Williamson v. Lee Optical Co. 348 US 483 in considering a law which made it unlawful for a person not a licensed optometrist or opthamologist to make eyeglasses without a prescription, the Court states at p. 487:

> "But the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." (emphasis supplied)

and again at p. 489:

> "The prohibition of the Equal Protection goes no further than invidious discrimination. (emphasis supplied)

A second line of cases is cited for comparison. In McLaughlin v. Florida, 379 US 184, the court considers a statute prohibiting unmarried interracial couples from living together at p. 191:

> "The courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose - in this case whether there is an arbitrary or invidious discrimination between those classes covered by Florida's cohabitation law and those excluded." (emphasis supplied)

and continuing at p. 191:

> "But we deal here with a classification based upon the race of the participants which must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the states. This strong policy renders racial classifications "constitutionally suspect," . . . and subject to the most rigid scrutiny . . . and in most circumstances irrelevant to any constitutionally acceptable lesiglative purpose" (emphasis supplied)

Also in Harper v. Virginia Board of Elections 383 US 663, wherein the Court considered the constitutionality of a poll tax at p. 668:

> "To introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor. The degree of the discrimination is irrelevant. In this context - that is as a condition of obtaining a ballot - the requirement of fee paying causes an invidious discrimination (Skinner v. Oklahoma 316 US 535, 541) that runs afoul of the equal protection clause."

and again from p. 670:

> "We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined.

In Graham v. Richardson 403 US 365 the Court considered a statute denying welfare payments to aliens at p. 371:

> Under traditional equal protection principles a state retains broad discretion to classify so long as its classification has a reasonable basis. . . But the Courts decision have established that classifications based on alienage like those based on nationality or race are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a discrete and insular minority . . . for whom such heightened judicial solicitude is appropriate." (emphasis supplied)

In Morey v. Doud, 354 US 457, the Court declared unconstitutional a statute regulating currency exchanges which forbade them to operate on the premises of any other business. Excepted from this law was the American Express Co. The Court said at p. 465:

> "On the other hand, a statutory discrimination must be based on differences that are reasonably related to the purposes of the Act in which it is found." (emphasis supplied)

and again at p. 467:

> "Although statutory discriminations creating a closed class have been upheld, a statute which established a closed class was held to violate the Equal Protection Clause where on its face it was, an attempt to give an economic advantage. . ."

However in Allied Stores of Ohio Inc v. Bowers 358 US 522 the Court sustained the constitutional validity of an ad valorem tax on property used in business unless the property was in a warehouse for storage purposes only. The Court states at p. 527:

> "The rule has often been stated that the classification must rest upon some ground of difference having a fair and substantial relation to the object of the legislation. . . 'If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law."

and again at p. 528:

> "Similarly it has long been settled that a classification, though discriminatory is not arbitrary nor violative of the Equal Protection Clause of the Fourteenth Amendment if any state of facts reasonably can be conceived that would sustian it." (emphasis supplied)

And in the Dunn case the Court considers a durational residence requirement as a prerequisite to the right to vote at p. 337:

> "We concluded that if a challenged statute grants the right to vote to some citizens and denies the franchise to others," The Court must determine whether the exclusions are necessary to promote a compelling state interest . . . This is the test we apply here."

and further at p. 342:

> "In sum durational residence laws

> must be measured by a strict equal protection test: they are unconstitutional unless the state can demonstrate that such laws are necessary to promote a compelling governmental interest.

and further at p. 343:

> "Statutes affecting constitutional rights must be drawn with 'precision,' and must be 'tailored' to serve their legitimate objectives. And if there areother reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a state may not choose the way of greater interference. If it acts at all it must choose less drastic means."

From these cases it is readily apparent that when federally protected rights are involved, classifications are suspect and strict scrutiny is required. Absent a federally protected right then the statute is entitled to the presumption of constitutionality and is not to be considered arbitrary or capricious if the classification has "a fair and substantial relation to the object of the legislation." Allied Stores of Ohio Inc. v. Bowers 358 US 522, 527.

As J. Tyler notes in Weiss at p. 77:

> Notwithstanding great advances in gerontology, the era when advanced age ceases to bear some reasonable statistical relationship to diminished capacity or longevity is still future. It cannot be said therefore that age cielings upon eligibility for employment are inherently suspect although their application will inevitably fall injustly on the individual."

Maximum age limitations have been recognized as valid in the area of jury selection, Carter v. Jury Commission 396 US 320, 335, Aikens v. Texas 325 US 398, 402.

Also of interest are age provisions in the Federal Constitution. Article 1, Section 2, clause 2 provides, "No Person shall be a Representative who shall not have had attained to the Age of twenty-five years; Article 1, Section 3, clause 3 provides, "No Person shall be a Senator who shall not have attained to the Age of thirty years," Article 2, section 1, clause 4 provides: ". . . neither shall any Person be eligible to that Office (President of the United States) who shall not have attained to the Age of thirty five years."

It will be an awesome day indeed when the Fourteenth Amendment is used to strike down provisions in the Articles of the Constitution.

## POINT III

LIMITING A TERM OF OFFICE BY THE AGE OF THE OFFICE HOLDER IS NOT VIOLATIVE OF FOURTEENTH AMENDMENT DUE PROCESS.

Appellants Due Process Argument is based on a line of Supreme Court cases culminating with Cleveland Board of Education v. La Fleur, 414 US 632. Appellants contend that Cleveland v. La Fleur is claimed to be authority for condemning an irrebutable presumption, claimed to be present in this case, that Judges Zichello and Nusbaum cannot effectively perform their judicial duties after age seventy, and such a provision is therefore violative of Fourteenth Amendment Due Process.

Quoting from La Fleur at 414 US 639:

> By acting to penalize the pregnant teacher for deciding to bear a child, overly restrictive maternity leave regulations can constitute a heavy burden on the exercise of these protected freedoms. Because public school maternity leave rules directly affect, "one of the basis civil rights of man," Skinner v. Oklahoma, supra, at 541, the Due Process Clause of the Fourteenth Amendment requires that such rules must not needlessly, arbitrarily or capriciously impinge upon this vital action of a teachers constitutional liberty." (emphasis supplied)

The essence of the Due Process argument in this case is made by the following dicta in La Fleur at p. 646:

> "Even assuming arguendo, that there are some women who would be physically unable to work past the particular cut off dates embodied in the challenged rules, it is evident that there are large numbers of teachers who are fully capable of continuing work for longer than the Cleveland and Chesterfield County regulations will allow. Thus the conclusive presumption embodied in these rules, like that in Vlandis is neither necessarily or universally true and is violative of the Due Process Clause.

The preceeding quotation makes it seem that the La Fleur case might have passed constitutional muster under the Equal Protection Clause tests (See Allied Stores of Ohio Inc. v. Bowers 358 US §22, 527) but not the Due Process test of "irrebutable presumption".

The question then follows from such an argument, can any classification which is discriminatory but constitutional under the Equal Protection Clause, withstand constitutional attack under the Due Process Clause and the "irrebutable presumption" test?

As Justice Powell portends in his La Fleur dissent at p. 652:

> As a matter of logic, it is difficult to see the terminus of the road upon which the Court has embarked under the banner of "irrebutable presumption." If the Court nevertheless used "irrebutable presumption" reasoning selectively, the concept of root often will be something else masquerading as a due process doctrine. That something else, of course if the Equal Protection Clause.[7] (emphasis supplied)

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7. Note, for instance that in Skinner v. Oklahoma 316 US 535 a case involving sterilization of habitual criminals

(footnote 7. continued)

the Court notes at p. 541:

> "Marriage and procreation are fundamental to the very existence and survival of the race."

And in Stanley v. Illinois 405 US 645 a case involving the right of an unwed father to have custody of his children, the Court states at p. 651:

> "The Court has frequently emphasized the importance of the family. The rights to conceive and raise ones children, have been deemed 'essential' . . . 'basic civil rights of man,' Skinner v. Oklahoma 316 US 535, 541 (1942). . ."

And in La Fleur at 414 US 639:

> "This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment. . .(citations ommitted) see also Skinner v. Oklahoma 316 US 535. . ."

While all three cases deal with the same federally protected right of procreation Skinner was an Equal Protection case while the later cases of Stanley and La Fleur were Due Process cases.

Also note that Dunn v. Blumstein 405 US 330 dealt with residency requirements on Equal Protection grounds while Vlandis v. Kline 412 US 441 deals with residency requirements on Due Process grounds.

However, whether rights are dealt with in terms of a group under the Equal Protection Clause or in terms of the individual under the Due Process Clause, one thing is certain a federally protected right must be in issue.

In Board of Regents v. Roth 408 US 564, the Court said at p. 569:

> "The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendments protection of liberty and property. When protected interests are implicated, the right to some kind of hearing is paramount. But the range of interests protected by procedural due process is not infinite." (emphasis supplied)

As to the range of interests protected by Fourteenth Amendment Due Process the Court continues in Board of Regents v. Roth at p. 572:

> "While this Court has not attempted to define with exactness the liberty . . . guaranteed [by the Fourteenth Amendment] the term has received much consideration and some of the included things have been definitely stated. Without doubt it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life . . ."

Surely, one who is required to campaign for election to a judgeship and to sit in judgment of other's rights, cannot be said to engage in a "common occupation of life."

The Supreme Court's decisions in McIlvanie and Weiss establish beyond question that mandatory retirement provisions, where reasonable, do not involve federally protected rights under either the Due Process or Equal Protection Clauses of the Fourteenth Amendment, and therefore involve no federal question.

## POINT IV

APPELLANTS PRESENT NO RIGHT PROTECTED BY THE FIRST AMENDMENT.

First Amendment protection of the electoral process is applicable to the states and state elections through the provisions of the Fourteenth Amendment Equal Protection Clause. As the Supreme Court states in Bullock v. Carter 405 US 134 at p. 140:

> "Although we have emphasized on numerous occasions the breadth of power enjoyed by the States in determining voter qualifications and the manner of elections, this power must be exercised in a manner consistent with the Equal Protection Clause of the Fourteenth Amendment."

The Supreme Courts approach to constitutional challenges of state election statutes has been to apply the Equal Protection Clause tests of the Fourteenth Amendment. Essentially the Court must determine whether the election statute, should be sustained if it can be shown to have some rational basis,[8] or whether it must

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8. At this point the opinion in Bullock cites in footnote 18 Dandridge v. Williams 397 US 471, 485 using the "rational Basis" test to uphold a law limiting the amount of welfare payments; and McGowan v. Maryland 366 US 420, 425-426 using again the "Rational Basis" test to uphold a law prohibiting sales of certain items on Sunday.

withstand a more rigid standard of review. Bullock supra at p. 142.

And in Bullock the Court continued at p. 143:

> "Of course not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review. (emphasis supplied) 9.

In Bullock the Court concluded that since the Texas laws which required candidates to file an excessive fee to be placed on the ballot, it had a significant impact on the franchise and therefore strict scrutiny was required.

Similarly in Williams v. Rhodes 393 US 23, 34, the Court found that the totality of Ohio's election laws as to qualifications to become a political party were invidiously discriminatory and as such imposed a burden on voting and assocional rights and impermissible under the Fourteenth Amendment, Equal Protection.

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9. As the court notes in Bullock at p. 142 . . . "the Court has not heretofore attached such fundamental status to candidacy as to invoke a rigorous standard of review." Citing in fn. 19 to the opinion Turner v. Fouche 396 US 346, 362 wherein the Court rejected the "Compelling State Interest" test and used instead the "Rational Basis" test to review a statute which conditioned the right to seek public office on a school board.

In dealing with appellants First Amendment voting and associational rights we are delaing in essence with Fourteenth Amendment Equal Protection Clause rights. As such this court is faced with the task of determining whether the test of "Rational Basis" or some "stricter" test is to be applied. Therefore the conclusion derived from analysis of appellants Equal Protection Clause rights, that is, that the "Rational Basis" test is to be applied, is no less applicable to appellants voting and associational rights.

## CONCLUSION

THE DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK SHOULD BE AFFIRMED.

Respectfully submitted,

ADRIAN P. BURKE
Corporation Counsel
Attorney for Appellees
KATZ, IRIZZARY and
BOARD OF ELECTIONS

By: William P. DeWitt
WILLIAM P. DeWITT

certificate

**~~AFFIDAVIT~~ OF SERVICE ON ATTORNEY BY MAIL**

State of New York, County of New York, ss.:

William P. DeW, III ~~being duly sworn~~, says that on the 13th day of December 1974, he served the annexed Brief upon S. Gellers, S. Gottlieb & L. Letkowitz Esq., the attorney for the parties on this Appeal herein by depositing a copy of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said attorney at No. their respective offices in the Borough of Manhattan, City of New York, being the address within the State theretofore designated by him for that purpose.

Sworn to before me, this

day of 19

William P. DeW, III

Form 323-50M-701108(71)